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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CITY OF LOS ANGELES, a
Municipal Corporation and
Public Entity of the State
of California,

Petitioner,

vs.

THANE CARL CHEW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Volume I of II

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED

1. Where a plaintiff sues a police officer under 42 U.S.C. 1983 for injuries resulting from the alleged use of excessive force, and sues the employing City for the same underlying incident under a Monell theory of liability, and where summary judgment is granted against the plaintiff respecting the Monell theory but the plaintiff proceeds to trial and obtains judgment on a general verdict against the officer individually which judgment is satisfied; whether the plaintiff may then appeal from the Monell Summary Judgment determination and upon reversal be entitled to proceed to trial again on the Monell theory on the basis of the same underlying incident

as was tried against the officer individually.

2. Whether the Los Angeles Police Department employment of canine resources shown by the facts of this case implicates Monell liability.

PARTIES TO THE PROCEEDINGS

Petitioner City of Los Angeles, a Municipal Corporation and Public Entity of the State of California was Defendant-Appellee in the court below. Thane Carl Chew was Plaintiff-Appellant in the court below. Although the Court of Appeal opinion also addressed the liability of Daryl Gates, Donald Yarnall, Mark Mooring and Patrick McKinley, these individuals were found

by a majority the Court of Appeals panel, to be within the purview of the qualified immunity, and are not before this Court. Daniel Bunch was a defendant below. His case is final and he was not a party before the Ninth Circuit Court of Appeals below.

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No._____

IN THE
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October Term, 1993

CITY OF LOS ANGLES, a Municipal Corporation and Public Entity of the State of California

Petitioner

vs.

THANE CARL CHEW,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner City of Los Angeles, a Municipal Corporation and Public Entity of the State of California, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed

in this case on June 27, 1994. Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit was denied by that court on August 30, 1994.

OPINION BELOW

This action produced three separate opinions from the Court of Appeals. The initial opinion is by Judge Reinhardt, with separate partial concurrences and partial dissents by Judge Norris and Trott. The Court of Appeals opinion was handed down on June 27, 1994, and is reported at 27 F.3d 1432. The opinion was issued by the Ninth Circuit in two volumes. Volume One of the opinion of the Court is attached hereto as Appendix A. Volume

Two of the opinion of the Court is attached hereto as Appendix B.

JURISDICTION

Petitioner was a Defendant-Appellee in this case in the Ninth Circuit below. The opinion and the judgment was entered on June 27, 1994. Pursuant to Rule 40 and Rule 35 of the Federal Rules of Appellate Procedure, petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on July 11, 1994. The Petition for Rehearing was denied and the Suggestion for Rehearing En Banc was rejected on August 30, 1994. This petition is timely filed within ninety days of that date (28 U.S.C.2101(c)). The Order Denying Rehearing is set forth in Appendix C. By its decision

in this case the Ninth Circuit has reversed a Summary Judgment determination in which the United States District Court for the Central District of California had concluded that the City of Los Angeles' determination to employ police dogs to apprehend hiding suspects in built up areas, by seizing and biting if necessary, did not implicate the City's Monell liability. This court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States Amendment 4, Appendix D-1
2. The Civil Rights Act of 1871 (42 U.S.C. 1983) Appendix D-1

STATEMENT OF THE CASE

This case arose out of a lengthy search for a suspect who had fled from the police into a scrapyard in Los Angeles in 110 degree heat on September 4, 1988--the hottest day of that year.

The record in this action upon which the Court of Appeals wrote its lengthy opinion, is somewhat limited. While this appeal was taken from the grant of a Summary Judgment motion which determined that the use of dogs by the Los Angeles Police Department demonstrated in the depositions in the action, did not implicate the City's Monell liability--the plaintiff nevertheless proceeded to trial against the involved individual officer and

obtained a judgment against him. That judgment was satisfied by the City of Los Angeles pursuant to California state law. Appellant, however, chose to appeal this action without the benefit of a trial transcript though the docket of the case reflected that the trial consumed four days (Dkt. No. 58-62). It appears the Court of Appeal record consisted of the depositions which had been before the District Court on the Summary Judgment Motion. (Dkt No. 10, 18, 20 and 24).

CHEW DEPOSITION

The deposition testimony of the plaintiff Thane Carl Chew reflected that he was detained for a traffic violation and was directed to wait at

the curb. While the officer was walking to the police car with Chew's drivers license, Chew fled.

Mr. Chew testified that on September 4, 1988 as he was driving on San Fernando Road his brakes went out, (Deposition of Thane Carl Chew taken December 5, 1988, p. 45) He coasted through a stoplight making a right turn and coasted to a stop. (Id. p. 46) A police car pulled up behind him. (Chew Deposition, p. 47) The officer asked for Chew's drivers license. After Chew presented his license to the officer (Id. pp. 48-49) Chew went over and stood on the curb while the officer walked to the police car. (Chew Deposition, pp. 51-52) Chew testified that at this point he remembered

getting scared because he had a warrant for burglary. (Chew, p. 52; p. 55) He was also aware of his failure to appear for that burglary charge. (Id. p. 55) He stood on the curb a couple of seconds while the officer went back to the police car. Mr. Chew testified that he then panicked because of the warrant and took off running. (Chew Deposition, p. 55) He did not remember the officer ever frisking him at any time before he took off running. (Id. p. 56) He ran for a distance until he reached a scrapyard. (Id. p. 56) Mr. Chew ran and then proceeded to climb a fence, ran a distance again and jumped another fence and saw a police car. He then ran again and jumped two more fences. From the scrapyard he was in,

he saw what appeared to be a black and white police car driving north on a street outside. (Chew Deposition, pp. 58-59) He saw two officers as he was trying to exit and believed the officers saw him. (Chew Deposition, p. 60) He jumped back into the scrapyard and ran again. (Chew Deposition, p. 60) Chew heard what appeared to be a helicopter but could not see it. (Chew Deposition, p. 70) He saw some scrap metal bins and proceeded to hide himself by squeezing in between what appeared to be two stacks of dumpsters. (Chew Deposition, pp. 70-73) He was squeezed in a squatting position between the dumpsters and stayed at this point for around two hours. (Chew Deposition, p. 74) Chew indicated that

he heard an officer say "Go north boy. Go north". He indicated he heard this about a half minute before seeing what he believed to be a police dog. (Chew Deposition, pp. 85-86) From the time he heard the statement, "Go north boy" until the time he saw the dog he did not do anything to surrender himself. After he saw the dog he stated "Call the dog. I'm coming out. Call the dog" After stating this he heard a voice saying "Get em boy". The dog proceeded toward him. (Chew Deposition, pp. 89-90) Chew testified the dog came up to him, opened its mouth and grabbed hold of his left side around his left hip. (Chew Deposition, p. 94) He was squatting motionless and made no move other than move his head.

(Id. p. 96) Chew testified that the dog seemed to be trying to pull him out, grabbing him by the left side. (Chew Deposition, p. 98) As the dog pulled Chew started falling toward the ground. He reached out with his left arm to stop himself. He testified the dog then bit him on his bicep. (Chew Deposition, p. 99) He indicated he did nothing to try to defend himself or try to get the dog off. (Chew Deposition, pp. 99-100) He stated the dog was biting him for one or two minutes. (Chew Deposition, p. 105) He heard commotion as of someone walking through the rubbish. (Chew Deposition, p. 103) He was approximately four to ten feet from the dumpsters and was laying on the ground. He noticed a police

officer. (Chew Deposition, pp. 107-108) He indicated the first thing he saw was what appeared to be a foot coming toward his head. (Chew Deposition, p. 108) He stated he had nothing in either his right or left hand and did not try to strike at the dog. (Chew Deposition, p. 109) He saw the officer after the officer's boot struck his forehead. (Chew Deposition, p. 110) He did not recall whether it was Officer Bunch because he did not get a good look at the officer. (Chew Deposition, p. 110)

BUNCH DEPOSITION

Officer Bunch testified he was summoned to the scrapyard where Chew was hiding at noon on the hottest day

of the year. It was 110 plus degrees. (Deposition of Daniel Bunch taken March 6, 1990, page 92) There were two other dogs looking for Mr. Chew. Bunch and his dog "Volker" had been out in the junkyard about 1/2 hour. (Bunch Deposition, p. 95) Officer Bunch indicated that if given an order to search that Volker would not necessarily in every instance, bite when he found a suspect. (Bunch Deposition, p. 100) In the instant case he had ordered the dog to search. He did not give any intervening order when Chew was found. (Id. pp. 102-103) As he came upon Chew, Chew was hitting the dog on its head and back with a metal pipe (Id. 89, 102-104, 110) Volker had Chew's other arm.

(Id., p. 111) Officer Bunch had not seen the dog when it initially bit the plaintiff. (Id. p. 125) When Officer Bunch saw Chew beating on Volker he yelled at Chew to stop hitting him. (Id. p. 132) It appeared to Bunch at this time that the dog was trying to back up and was attempting to dodge the blows. (Id. p. 134) Bunch lowered himself down between the dumpster where Chew was situated and attempted to kick the pole out of Chew's hand. (Id. pp. 134-35) He kicked several times before he was eventually able to kick it out of Chew's hand. (Id., pp. 136, 152-53) Bunch did not think he kicked Chew in the head in this process, but he didn't have a clear recollection of it. (Id., pp. 136-37) Bunch testified he

couldn't say with any certainty that he hadn't kicked Chew in the head, but he indicated this was not his intent. (Bunch Deposition, p. 137) Once Chew dropped the pole, Bunch indicated that he "downed" Volker, that is he had the dog release the suspect, back up and get down. (Id. p. 138) Bunch testified that Chew never said anything like, "Call off your dog". In fact Chew didn't say anything until Bunch kicked the pole out of his hand. Bunch testified Chew's full attention was on beating the dog. (Bunch Deposition, p. 146)

While the testimony of Chew and Bunch addressed the incident itself out of which Bunch's liability ultimately arose, the plaintiff had also named

other defendants: Police Chief Daryl Gates, Police Captain Patrick McKinley, and Police Sergeants Donald Yarnall and Mark Mooring, as well as the City of Los Angeles.

GATES DEPOSITION

Daryl Gates was Chief of Police at the time. Chief Gates testified that the Los Angeles Police Department used dogs in very complex searches for those suspected of crime in large buildings and large areas. He testified that it takes substantial officer resources to cover such areas. (May 18, 1990 Deposition of Daryl Gates, pp. 11-12) Gates testified that the City's K-9 program originally began as a pilot project. Before implementing a K-9

program the City wanted to be certain this was a safe operation. He testified "We were concerned about officer safety, dog safety and suspect safety . . . and the general public's safety. (Gates Deposition, p. 15) Chief Gates indicated he was involved at this stage in discussions governing the use of dogs. There was a conscious decision not to use dogs in crowd control. (Id., p. 12) The original pilot project involving the use of dogs had gone very successfully. Based upon the report at the end of the project, Chief Gates determined to go ahead with the program as a regular project. (Id., p. 19) Chief Gates testified that policy for the Los Angeles Police Department was established by himself

and the Los Angeles Police Commission. (Gates Deposition, pp. 36-38) Each month the Chief of Police reported to the Police Commission, often including particularly noteworthy incidents where dogs were used. (Gates Deposition, p. 23) Policy regarding the use of Police Department dogs was contained in Special Order 3 included as Exhibit 7 to the deposition of Chief Gates. (Id., Gates Deposition, pp. 27-30) This Special Order read in part as follows:

> "Police dogs are a multi-functional asset of the Los Angeles Police Department. Police dogs may be used in appropriate circumstances to assist officers in the search

> for criminal suspects; the detection and location of narcotics and/or explosives; and the location of missing adults or juveniles."
>
> The order went on to provide: "When a police dog is deployed, the dog handler shall be solely responsible for the control and direction of the dog." (Special Order No. 3, inter alia, Exhibit 7 to the Gates Deposition)

Chief Gates testified that a police dog does not necessarily bite a suspect every time it is out of sight of the handler and finds the suspect. (Gates Deposition, pp. 42, 44) He also indicated that such a dog would not necessarily bite a motionless suspect.

(Gates Deposition, pp. 48-50) He indicated that the policy in employing the use of dogs underscored close control. For example, he testified: "Well, right from the beginning, the people involved in the pilot program stressed close control." (Gates Deposition, pp. 20-21) Chief Gates testified that the reaction to a police dog "Call off your dog" was a normal reaction. (Id., p. 53)

YARNALL DEPOSITION

Other than Chief Gates there appeared to be no other individuals implicated in the lawsuit who could truly be claimed to be City policy makers. One of the individual defendants was a person of long

experience in dog handling and dog training who had been with the K-9 program from its very inception. Donn A. Yarnall had been a police officer for 19 years at the time his deposition was taken. (Deposition of Donn Yarnall, taken June 14, 1990, p. 3) Yarnall had been with the dog program for a substantial period before October of 1988. He had been promoted to a patrol sergeant at that time and indicated the promotion ended his "dog career". (Yarnall Deposition, p. 89) Yarnall's experience in dog handling was extensive and went back more than 15 years. (Id. p. 15) In Yarnall's many years of experience he testified that if a suspect attempted to flee or fight, the dog was used to control the

suspect. Control was maintained if a suspect sought to fight or flee, by biting. (Yarnall Deposition, p. 19) Yarnall testified that from the beginning of his career in dog handling, however, if the suspect offered no resistance, the trainer would call the dog back. The handler was trained to stay within the sight of the dog. If it looked as though the dog was getting out of sight the handler would recall the dog. (Id., p. 19, p. 25)

Yarnall testified that a dog's decision to bite an individual could not be generalized. The dog would usually bite what was moving, whether it was an arm or a leg. If the suspect was hitting the dog with his arm, the

dog would usually transfer the bite to the arm. (Id., p. 36)

Sgt. Yarnall testified that the entire concept of the K-9 unit started out as an experimental program. (Yarnall Deposition, p. 50-51) The search dog program also started out as an experimental program. The program envisioned that the dog and trainer would be together night and day and would travel to a particular location in the City when called. (Id., p. 41) Yarnall had also conducted the training of various narcotic detection dogs in 1977 or 78. (Id., pp. 42, 44)

Sgt. Yarnall testified that the program's inception was during the "post-proposition 13 era" and one of the factors mentioned in the proposal

was that a dog could search much more efficiently, much faster and with greater safety than a human being. (Yarnall Deposition, pp. 51-52) In this new program the dog handler worked closely with the dog and would call the dog back when it got out of sight of the handler. (Yarnall Deposition, p. 56) Sgt. Yarnall indicated that suspects who did not resist were not bitten (Id., pp. 57-59) However, every situation was different (Id., p. 67)

Yarnall described the qualities he looked for in a patrol dog. He stated that a patrol dog must be temperamentally sound, show no fear, and be confident within himself. He must like people and not be quick to

bite or protect himself. The patrol dog must not be fearful or afraid of noises. Yarnall indicated there should also be a pronounced hunting or pack drive - that is the dog must have the ability to be channeled, commanded and obedience trained. (Yarnall Deposition, p. 75)

Sgt. Yarnall had developed the initial training manual for the K-9 unit during the early 1980's. (Yarnall Deposition, pp. 82-83) The K-9 unit had been a big success within the Department and Yarnall felt the manual would provide guidelines as well as an information resource for handlers. The manual also standardized the certification process. (Id., p. 83) He testified, the certification process

which a dog would have to go through, was without question the most difficult certification in the Country. (Id., p. 84) The best handlers were sought to be put together with the best dogs. Handlers had to pass an oral board and a background examination. A person would be disqualified if the person had a history of excessive force or personnel complaints. The oral examination sought to separate out individuals to be handlers who had maturity and emotional stability. (Id., pp. 86-88) Both the dog and trainer were trained together. Sgt. Yarnall indicated he had trained the dog in this case "Volker" and he had also trained Officer Bunch. (Yarnall Deposition, p. 97-98)

Sgt. Yarnall testified that the Police Department works very hard with the community to show them that, under normal circumstances, the dogs will not bite them. The dogs were often taken to grammar schools "With hundreds of kids petting them and climbing on then." On the other hand he indicated "I think it's common knowledge we have had police dogs in this Country from 30-40 years now. And I think you don't have to be an expert on the subject to know that if you run from a police dog, he'll bite you. That's normal." (Id., p. 93)

Sgt. Yarnall testified that the "find and bark" technique in dog handling was abandoned in 1987 or 1988 because the handler was not as readily

able to maintain control of the dog in this circumstances. This difficulty in maintaining control occurred because the handler would have to go up to the dog and yank on the collar and in doing so, expose himself to a felony suspect. As a safety factor Yarnall testified the find and bark technique was eliminated. (Id., p. 94) Yarnall indicated it would be against training to order a dog to get a suspect who was not armed and who had given up. (Id., p. 101) On the other hand, Yarnall testified that an officer must also assume for the sake of his own safety, that each suspect he is searching for is armed. If you do not make such an this assumption, Yarnall intimated, you will get yourself killed (Id., p. 102)

Yarnall testified that if a suspect says "I give up; Call off your dog", the handler has the option to either "down" his dog at the position he is at, or recall the dog. (Id., pp. 104-105) The substance of Yarnall's testimony was that this all depended on the specific situation. (Id., pp. 105-106)

MOORING DEPOSITION

Mark Mooring was a police officer for the City of Los Angeles who held the rank of Sergeant. In 1989 he had been assigned to the K-9 unit for about nine years. (Deposition of Mark Mooring, taken Wednesday, March 21, 1991, pp. 3-4) Mooring, similarly to Sgt. Yarnall, was not a City policy

maker. (Id., p. 71) Mooring testified that the City had used K-9s since 1980. (Mooring Deposition, p. 6, p. 15) He testified that Chief Gates was the highest member in the police department who approved the use of K-9s by the Department. (Id., pp. 10, 15, 16) Sgt. Mooring testified that the City maintained a manual for the handling of K-9s. (Id., pp. 8-9, 52-54) He stated there were many reasons for the use of K-9s including the officer safety factor when searching for felons as well as the success of ferreting out a concealed suspect by using the dog's sense of smell. (Id., p. 14) Mooring testified that the dogs were trained to sniff out suspects, to jump over or climb over obstacles, and to obey

specific commands. If necessary the dogs were trained to bite and hold a suspect until told to release, however in general, they were not trained to bite and re-bite. It was the trainer rather than the dog who made these decisions. (Id., pp. 41-43)

Mooring had attended several training seminars and had spent tine with other trainers. (Id., pp. 32-33) Mooring testified that it was not a fair statement that in every case a dog should find someone on a search, and bite the person. The handler in all situations was required to maintain the control of the dog, so that such a person would not be bitten. (Id., p. 47) He also testified that the handler was not supposed to let the dog out of

his sight. (Id., pp. 63-64)

Sgt. Mooring testified to a canine tactic earlier employed where the dog would find a suspect and the dog would bark as long as the suspect did not move. (Id., pp. 48, 61-62) He indicated that there had been changes in the manual with respect to this tactic, sometime in 1989 or 1988 (Id., pp. 61-62) He indicated there was an emphasis upon putting the responsibility upon the handler to remain much closer to the dogs. (Id., pp. 63-64)

Sgt. Mooring indicated that a State law, California Civil Code Section 3342, provided than an officer would not be liable for the proper use of the police dog. (Id., p. 70) He

indicated that the Department kept statistics to monitor the percentage of time a dog would bite a suspect. The Department employed this information as a "weather vane" to assure that any particular dog handler officer was not abusing his power. (Mooring Deposition, pp. 73-76)

McKINLEY DEPOSITION

Patrick McKinley testified that he was a Captain in the Los Angeles Police Department. He was the commanding officer of the Metropolitan Division. (Deposition of Patrick McKinley, taken March 29, 1990, p. 3) Captain McKinley was not a policy maker for the City. He indicated that policy could only be made by the Chief of Police and the

Board of Police Commissioners. McKinley testified that within his Metropolitan Division there were a number of different units including the K-9 units, a SWAT unit, an equestrian unit and a crime task force. (McKinley Deposition, p. 8) At the time the K-9 unit evolved, McKinley testified, it had been introduced without the approval of the Police Commission. However, K-9 matters had recently been placed into the Police Department manual effective March 30, 1990 as a special order of the Chief of Police. (McKinley Deposition, pp. 10-11) McKinley testified the order had gone before the Board of Police Commissioners about two weeks earlier. (Id., p. 12)

McKinley testified that the K-9 program began as a trial program. The program proved effective and was eventually assigned to the Metropolitan Division. (McKinley Deposition, pp. 12-13) The Police Planning and Research Division wrote up the special order for the Chief's signature. (Id., pp. 13-14) When McKinley became Commander in 1988, there already were records kept of the number searches made using dogs, the number of suspects found and the number of bites per suspect. (Id., p. 29) These records had been computerized. (Id., p. 30) Captain McKinley indicated that the dog training procedures had been evolving at the time he became commander. (Id., p. 35) He testified that he had

discussed with Sergeant Mooring what he would term a "philosophical difference" between what was termed "find and bark" and "handler control." There was a concern in the department about the number of use of force incidents - not that dogs were involved in, but the handlers themselves. McKinley indicated that he and Sergeant Mooring discussed these issues, and out of these discussions came the point that for the safety of everyone - both the suspect, the dog and the community - it was necessary for the handler to be "on the point" - that is very close to the animal. McKinley narrated that the only way the handler could do this was to be close to the animal and this is why he called this "handler control."

(Id., p. 36) McKinley testified:

> "So, in my evaluation of it, I determined that what I'm -- in a find and bark policy, we are depending on an aggressive animal to respond to training that we can't be sure of; that no one can be sure of. Therefore, I agreed with Sergeant Mooring and the experts that it's . . . "And from what I have seen of the dogs, when they're hunting -- when they're seeking, the only thing that they will respond to, over their natural instincts to fight and to hunt, is the commands of their handler. And it's

extremely important that that handler has control over the dog and the handler has -- has, as much as possible, a close proximity to the dog. . . "Now, that puts our handler in a -- in a danger -- much more dangerous position. But because of the concerns I have for both community and every one involved, I think that's the safer -- safer method. I don't think, from what was explained to me, that you can depend on an animal to always respond to the training as -- as it would be given to him." (McKinley Deposition,

pp. 38-39)

While McKinley indicated that it was desirable that the handler be close to the dog at all times, he indicated that if a handler did lose sight of the dog, if the suspect remained still and did not get aggressive, but just stood still, the dogs were trained not to be aggressive or bite. However, McKinley cautioned that they cannot always guarantee this. (McKinley Deposition, p. 41) He continued however ". . . it's my opinion that, in the majority of instances with -- almost universally with our dogs -- if that suspect just remained still, the dog won't bite, and the handler has the, generally speaking, the time when the handler doesn't have direct eye contact with

the dog is very, very, ah, momentary -- perhaps for lack, of a better term. As I've seen our boys as they work, they really try to stay in close proximity to their dogs." (McKinley Deposition, pp. 41-42) McKinley reiterated that it was "incredibly necessary that we go to a handler control situation where the handler was with the dog and the dog was under the control of the handler because find and bark -- find and stand -- whatever one wants to call it -- cannot be guaranteed." (Id., p. 45) McKinley emphasized that it was necessary for the handler to be there when the dog was hunting for a person because it could not be guaranteed without the handler there that the dog would not

harm the person. (Id., p. 46) He indicated while City liability may have been mentioned in the course of his discussions with Sergeant Mooring, liability was really a moot issue as they were simply trying to do the right thing . . . "we do what we think is right." (Id., p. 49)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

There are two essential reasons why this Court should grant certiorari in this case. The first reason addresses the use of canine resources by police departments--an area which cries out for a rule of national uniformity in light of the patent conflict this decision creates with the

6th Circuit decision in Robinette v. Barnes. 854 F.2d 909 (6th Cir. 1988) Even without the clash of the Circuits, however, canine resources are simply too important to the preservation of the lives of police officers and pursued suspects to not review a decision like this one which directly implicates virtually every police canine program in the country under Monell. If Los Angeles' program can't pass muster, given the consideration which went into it, most other canine programs will fall. This issue has wide ramifications and is clearly a question of overriding National importance. The stakes inherent in such an issue are enormous, and lives could literally hang in the balance.

The second reason why this Court should grant certiorari lies in the fact that Thane Carl Chew, the plaintiff and appellant, has already has his day in Court, has already obtained a judgment, and has already had the judgment satisfied. The trial court's charge to the jury required that in the event the jury found the defendant liable it should compensate the plaintiff for all damages which he had incurred. (Dkt. No. 68) While the plaintiff was the only party in the action who could have known for sure that he would be appealing, he never sought any clarification of the basis for liability in the District Court. He simply obtained his judgment and then went on without explanation to

raise the Monell issue in the Court of Appeals. The decision of the Court of Appeals indicates that the $13,000 damages judgment which Chew received may have been for a kick in the head by Bunch rather than the bites by Volker. While petitioner feels such a conclusion defies common sense, given the complexion of this case, it also unfairly places the burden of showing which injuries were being compensated, upon the defendants, who had no ability to know or control whether or not Chew would appeal. The entire transaction in this matter took place in a very abbreviated time period and it can only be concluded that the jury ultimately awarded damages on the entire case before it and not some isolated

movement by Officer Bunch as painted by the Court of Appeals.

I

THE EXTENSIVE TRAINING PROVIDED THROUGH L.A.P.D.'S CANINE PROGRAM SHOWN BY THE RECORD IN THIS MATTER COULD NOT POSSIBLY IMPLICATE MONELL LIABILITY ON THE PART OF THE CITY OF LOS ANGELES

The past few decades have witnessed an unprecedented rise in the use by police agencies of police dogs to assist officers in finding concealed suspects in built-up obscure or otherwise difficult areas. These animals' remarkable sense of smell will easily find hiding suspects in concealed places, in buildings and in

built-up areas with far greater efficiency than unaided police officers and at the same time reduce the risk of a direct police-suspect confrontation. This obvious benefit inherent in the use of canine resources in searches for suspects in built-up areas is well recognized and has been adopted in a substantial number of police departments throughout the United States. The benefits of these canine resources was best expressed in Robinette v. Barnes, 854 F.2d 919 (6th Cir. 1988)

> "Indeed, instead of generally causing deadly force to be used to apprehend criminals, we believe that these dogs often can help prevent

officers from having to resort to, or be subjected to, such force. . . . The use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of the officers, bystanders and the suspect. . . We are not persuaded by the evidence presented that the remote possibility that the use of a police dog to apprehend a felony might, under extraordinary circumstances, cause death, outweighs the

dog's proven benefits for effective law enforcement." (Robinette v. Barnes, 854 F.2d 902, 914)

The opinions of the majority[1] appear to reject this holding in Robinette v. Barnes, which until now was the seminal Section 1983 canine case. The majority's holding in the instant action concludes that the use of police dogs to find and seize, suspects by biting if necessary, should be tried to a jury and may give rise to

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[1]For the purposes of this Petition, the majority refers to the opinions concluding to reverse the Summary Judgment determination as to the City of Los Angeles which were written by Judge Reinhardt and Judge Norris.

Monell liability. The posture of the 9th Circuit stands in a dramatic opposition to that of the 6th Circuit which has been widely regarded as the law on this subject.

A substantial part of the decision of the majority seems premised upon the conclusion that the officer's release of the dog, given the training of the dogs and their handlers may give rise to liability under Monell. A few years ago, this Court in City of Canton v. Harris, 489 U.S. 378, 391-92 (1989) concluded that a deficient training program evincing deliberate indifference where that inadequate training is the moving force causing the constitutional violation may implicate Monell liability. The record

in this action, however, belies the suggestion of inadequate training. In fact, the training was substantial and involved a standardized certification process. Both the dog and the trainer were trained together. (Deposition of Yarnall, pp. 97-98) The best handlers were sought out to be combined with the best dogs. The handlers went through a background examination and were disqualified if any had a history of excessive force or personnel complaints. The handlers had to pass an oral board designed to call out only persons with a substantial maturity and emotional stability to become dog handlers. (Id., pp. 86-88)

Los Angeles had promulgated an extensive canine manual which provided

guidelines and information. The program even provided for a standardized certification process for the dogs. (Id., p. 83) Sergeant Yarnall had concluded that this certification process was the most difficult in the country. The evidence produced on the dog training and handler training was largely unrebutted. The evidence hardly reflects a municipal policy of deliberate indifference in the training of either the dog or the handler, yet the majority glosses over many of these details, and simply concludes that the case should be retried under Monell. Given the protracted training to which both the dog and handler were exposed in the City's program, it is very

likely that if the City of Los Angeles canine program should implicate potential Monell liability, there would be few programs utilizing dogs in other cities which could possibly survive. However, the greater vice here lies in the insidious reality that in challenging the constitutionality of the use of police dogs we are ultimately weighing the possibility a suspect may be bitten against the possibility of loss of life. Given the very substantial stakes which are at issue, this case entreats this Court to grant certiorari so that the use of police dogs may continue to save the lives of police officers and the suspects whom they pursue, and not become a National legal battleground

for Monell liability of America's police departments.

II

THIS COURT SHOULD EXAMINE THE QUESTION OF WHETHER A PLAINTIFF WHO HAS ALREADY BEEN THE PRESUMED RECIPIENT OF A JUDGMENT FOR ALL DAMAGES UNDER SECTION 1983, SHOULD BE ACCORDED ANOTHER TRIAL ON THE ISSUE OF MONELL LIABILITY.

The issue of whether or not Chew should be accorded a second trial after receiving a judgment and obtaining satisfaction of that judgment, is one which implicates a very sound common sense doctrine. There was only one controversy here and that was in the release of the dog and the short span

of events which ensued thereafter. The entire incident erupted with the release of the dog and the trial court explicitedly instructed the jury, in the event that it found the defendant liable, to compensate the plaintiff for all damage which he had incurred. (Dkt No. 68) The jury rendered a verdict in favor of the plaintiff for $13,000.00 and that judgment was satisfied by the City of Los Angeles. (Dkt. Nos. 72, 73, 74, 84) The Court of Appeals' opinion concludes that it cannot be discerned whether the jury awarded damages for the dog bites or for the kick which Chew alleged he sustained: ". . . "while on the basis of the record before us, it appears that the jury may have compensated Chew for

Volker's bites, we cannot say with any assurance that it did so." This appears to ignore the fact that the dog was the central focus of this entire matter and it was the release of the dog which brought about the causal forces which resulted in all of the things which followed. Only one individual cause of action was alleged, and it is doubtful that the jury isolated out the dollar value of a kick from the dollar value of a bite in the fray which followed the release of the dog. This entire matter culminated in a single event in which Volker bit Chew and Bunch admitted he may have kicked him in the head. More importantly, however, this Court must determine when and under what circumstances a

potential Monell cause of action will be barred by the satisfaction of the judgment in the underlying individual Section 1983 action.

Defendant contends that it is a judicial waste to now proceed on a Monell theory of causality after the City has paid the judgment. This position, however arises from a controversial District Court opinion emanating out of the Central District of California to which the Court of Appeal opinion does not truly allude. The case was extensively cited in the briefs below. In Sanchez v. City of Riverside, 596 F.Supp. 193, 195 (C.D. CA 1984), the District Court for the Central District of California held that once a municipality agreed under

state law that it was obligated to pay the judgment against its employee defendant, the plaintiff could not thereafter proceed against such a city under a Monell theory. The Sanchez Court concluded this on the basis of mootness or the lack of in Article III "case and controversies" jurisdiction. The Court concluded that, because in such an event, the Monell prosecution would be a method of simply showing the same ultimate liability was caused through a somewhat different theory of causality. This purpose sought no more than an advisory adjudication against the City. While the reasoning which the District Judge in Sanchez set out with such clarity, has often been ignored by other courts and circuits,

it needs to be addressed in a case of national application such as this one. The District Court's reasoning in Sanchez was simple.

> "Monell, of course, does not create a separate class of constitutional wrongs; it merely provides that under certain circumstance a municipality may, itself, be held liable as a 'person' for deprivation of a constitutional right, (citation), as well as the individual perpetrator of the wrong. Since all compensable damages resulting from the constitutional wrong to plaintiff Sanchez have been

assessed and the City has agreed to pay the judgment, nothing further remains to be adjudicated." (Sanchez, at 195)

This Court needs to examine this proposition if for no other reasons than that of the potential repeated expenditure of judicial resources addressing essentially the same underlying facts. However, there are also important questions in the fairness of a case in which the appellant who never obtained a special verdict and never ordered up a transcript of the trial proceedings, is not given the burden of establishing the basis of his own judgment. To

place the burden of showing exactly how such a jury determination was produced upon the appellee, is to violate a rule of convenience in which only the appellant truly knows whether or not an appeal may ultimately ensue from these determinations. This Court needs to better examine all of the policies implicated in this issue.

III

CONCLUSION

For all of the foregoing reasons, this Court should issue a Writ of

Certiorari to review the judgment and opinion of the United States Court of Appeal for the Ninth Circuit.

DATED: November 22, 1994

Respectfully submitted,

JAMES K. HAHN, City Attorney
THOMAS C. HOKINSON, Senior
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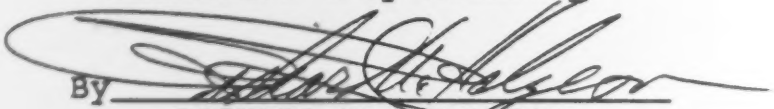
By 
RICHARD M. HELGESON
Assistant City Attorney

CHEW v. GATES APPENDIX A

OPINION VOLUME 1

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THANE CARL CHEW,

Plaintiff-Appellant,

No. 91-55718

v.

D.C. No.
CV-89-5204-RG(Tx)

DARYL GATES, individually as Chief of Los Angeles Police Department; City of Los Angeles, a Municipal Corporation and Public Entity of the State of California; and DANIEL BUNCH; DONALD YARNALL; MARK MOORING; PATRICK McKINLEY; and DOES 1 through 10, 14, 16 through 20, inclusive, each individually and as a Los Angeles Police Officer,

OPINION

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California

Richard A. Gadbois, Jr., District Judge Presiding

Argued and Submitted
August 18, 1992 - Pasadena, California

Filed June 27, 1994

Before: WILLIAM A. NORRIS, STEPHEN REINHARDT AND STEPHEN S. TROTT, Circuit Judge

Opinion by Judge Reinhardt; Partial Concurrences and Partial Dissents by Judges Norris and Trott

SUMMARY

**Individual Rights Civil Rights
Constitutional Rights**

The court of appeals affirmed in part a district court judgment, reversed in part, and remanded. The court held that the district court erred in holding that a police department's policy governing the use of dogs to seize fleeing or hiding suspects was constitutional.

An officer of appellee City of Los Angeles' Police Department stopped appellant Thane Chew for a traffic violation. Chew fled from the officer and hid in a scrapyard. After the officer discovered that there were outstanding warrants for Chew's arrest, canine units were called in to search for Chew. Officer Daniel Bunch and his

charge, police dog Volker, were dispatched to assist in the search. Bunch unleased Volker, and approximately two hours after Chew had fled to the yard, Volker found him crouching between two metal bins. At the time, Bunch was not in sight of Volker. Bunch did not immediately accede to Chew' request to call off the dog. Volker bit Chew several times and then seized him. Chew sustained injuries. Bunch admitted kicking at Chew in an attempt to disarm him and to protect Volker.

Chew brought a civil rights action against the City, Bunch, and various other members of the Department, alleging violations of his Fourth and Fourteenth Amendment rights. Chew

claimed that Bunch violated his right not to be subjected to excessive force by unreasonably releasing Volker, and that Bunch's action was caused by a City policy, custom, or usage. Chew also claimed that, regardless of the reasonableness of Bunch's action in releasing the dog, the City's policy of training police dogs such as Volker to apprehend unarmed and non-resistant suspects by biting, mauling, and seizing them was itself unreasonable and unconstitutional.

The district court granted summary judgment in favor of the individual defendants other than Bunch (other defendants) on the ground of qualified immunity, and in favor of the City on the ground that Chew failed to

demonstrate that a City policy unlawfully caused his injuries. The court held that the Department's policy governing the use of dogs was constitutional. A jury rendered a verdict in Chew's favor against Bunch, and the City paid the judgment on Bunch's behalf.

Chew appealed the district court's grant of summary judgment.

[1] Chew's claims against the other defendants were not moot. the three constitutional violations alleged against Bunch were different from the constitutional wrongs that they allegedly committed. [2] In addition, Chew could recover actual damages from the other defendants.

[3] The satisfaction of the

judgment against Bunch did not bar Chew from pursuing his claims for actual damages for his dog-bite injuries against the remaining defendants.

[4] The district judge erred in finding as a matter of law that Bunch's decision to release Volker was reasonable. [5] A rational jury was not required to decide that using Volker to apprehend Chew was reasonable. [6] The force used to arrest Chew was severe, [7] and Bunch had good reason to expect that Chew might be mauled when he released Volker. [8] In addition, the record did not reveal an articuable basis for believing that Chew was armed or that he posed an immediate threat to anyone's safety. [9] Under all of the

circumstances, the question of the reasonableness of the decision to use the force involved, whether or not "deadly," to seize Chew had to be submitted to a jury. The record did not render reasonable as a matter of law the considered judgment to unleash a German Shepherd trained to seize suspects by "biting hard and holding," by mauling and sometimes seriously injuring them. [10] The question whether it was reasonable under the Fourth Amendment for Bunch to release Volker was for the jury.

[11] There was little doubt that a trier of fact could find that Chew's injury was caused by City policy. In the district court, the City conceded, for purposes of summary judgment, the

truth of Chew's contention that Department policy authorized seizure of all concealed suspects by dogs trained to bite hard and hold. Accordingly, the district court's grant of summary judgment in favor of the City had to be reversed.

[12] There was a genuine issue of material fact as to whether the other individual defendants authorized, approved, or acquiesced in the canine force policy. [13] However, the district court's grant of summary judgment in favor of the individual defendants other than Bunch on the ground of qualified immunity was proper. [14] At the time of Volker's assault, there was no clearly established law prohibiting the use of

dogs in the manner permitted by the Department's policy.

Circuit Judge Norris concurred in part and dissented in part, stating that whether the police dogs, trained by the Department to bite and hold, were instruments of deadly force was an issue of fact that could not be resolved on the summary judgment record. In addition, the individual defendants could not be cloaked with qualified immunity because there was no evidence that would permit a determination that a reasonable officer could have believed Department dogs such as Volker did not constitute deadly force.

Circuit Judge Trott concurred and dissented, stating that the release of

a police dog to apprehend Chew was objectively reasonable as matter of law.

COUNSEL

George Denny, III, Law Offices of Ronald M. Katzman, Sherman Oaks, California, and Ralph Leardo, Law Offices of Nancy Ann Fellom, San Francisco, California, (argued) for the plaintiff-appellant.

Richard M. Helgeson, Assistant City Attorney, Los Angeles California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

On appeal, Thane Carl Chew seeks the right to pursue his claims for

damages resulting from dog bites inflicted on him by a police dog the Los Angeles Police Department uses to capture suspected criminals. Chew brought his action in federal district court pursuant to 42 U.S.C. section 1983. He sued the City of Los Angeles, Police Chief Daryl Gates, and various other members of the police department for violations of his Fourth and Fourteenth Amendment rights. The district court granted summary judgment to all of the defendants except Officer Daniel Bunch. When Bunch's case went to trial, Chew introduced evidence that the officer both turned the police dog loose on him and assaulted him directly. The jury returned a general verdict in the amount of $13,000

against Bunch. This appeal involves only the district court's grant of summary judgment in favor of the other defendants, including the city. We have jurisdiction under 28 U.S.C. 1291.

Although there are a number of important issues raised by this case, the two most fundamental are whether the Los Angeles Police Department's policy governing the use of dogs to seize fleeing or hiding suspects is unconstitutional and whether, if so, the officers who are responsible for promulgating that policy enjoy qualified immunity. The latter question, while important, is more of theoretical than practical import in this case because if the policy is

unconstitutional the city will be liable for whatever damages result in any event.

With respect to the first question, a majority concludes that the district court erred in holding the police department's policy governing the use of dogs constitutional. We do so for somewhat different reasons. Judge Norris prefers to concentrate on the issue of whether the force involved--the use of police dogs to seize and bite people--is deadly while I would approach the issue more broadly: by examining the question whether the force is excessive - deadly or not. Nevertheless, our conclusions are similar and both issues must be considered by the factfinder upon

remand. Accordingly, we reverse the district court's judgment in favor of the city. Because the matter is here on summary judgment, we do not now hold the city's policy unconstitutional but merely remand for a trial by jury of the substantial Fourth Amendment issues that exist.

With respect to the question of qualified immunity, a different majority, Judge Trott and the author, agree that the individual policymakers may not be held liable. We conclude that the law with respect to the use of police dogs to seize and bite concealed suspects was not sufficiently established that a reasonable officer would have known that the Los Angeles Police Department's policy was

unconstitutional.

I. Facts and Proceedings

At about 2 p.m. on September 4, 1988, an officer of the Los Angeles Police Department stopped plaintiff Thane Carl Chew for a traffic violation in part of the City of Los Angeles known as Pacoima. Chew subsequently fled from the officer on foot and hid in a scrapyard. The officer had not searched him for weapons. Upon discovering that there were three outstanding warrants for his arrest, the officer radioed for assistance. A police perimeter was set up around the scrapyard, and a helicopter and canine units were called in to search for Chew.

Officer Bunch and his charge,

police dog Volker, were among those dispatched to assist in the search of the scrapyard. Bunch unleashed Volker and, approximately two hours after Chew had fled to the yard, Volker found him crouching between two metal bins. According to Chew, as soon as he became aware of Volker's presence, he attempted to surrender and yelled to the police to call off the dog. Both sides agree that at this point Officer Bunch was not within sight of Volker. The parties further agree that Officer Bunch did not immediately accede to Chew's request, that Volker bit Chew several times and then seized him, and that Chew sustained severe lacerations to his left side and left forearm. Chew asserts that he did not offer

resistance at any time after he spotted the dog and repeatedly begged the officers to restrain his dog, but Bunch instead ordered Volker to attack. Bunch, on the other hand, vigorously denies that he ordered an attack and maintains that when he first saw Chew, the suspect was hitting the dog with a pipe. Bunch admits kicking at Chew in an attempt to disarm him and to protect Volker, and acknowledges that he may have kicked Chew in the head, face, or body.

Chew subsequently brought this action in federal district court, alleging violations of his Fourth and Fourteenth Amendment rights. The first claim of Chew's amended complaint named Officer Bunch, Sergeants Donald Yarnall

and Mark Mooring (who trained the L.A.P.D. canines), and Captain Patrick McKinley (who had overall supervisory responsibility for the K-9 unit) as defendants in their individual capacities. In his second claim, Chew sued the City of Los Angeles under Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), for injuries allegedly resulting from the city's policy regarding the use of canine force. In the latter claim he also named Police Chief Daryl Gates in both his individual and official capacities as an employee with policymaking authority.[1]

The district court granted summary

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[1]McKinley was also named in the second claim as a policymaker.

judgment in favor of the individual defendants other than Bunch on the ground of qualified immunity, and in favor of the City of Los Angeles on the ground that Chew had failed to demonstrate that a city policy unlawfully caused his injuries. The case proceeded to trial against Officer Bunch, and the jury rendered a $13,000 general verdict in Chew's favor. Pursuant to California Government Code 815.2 and 825, the city has paid the judgment and attendant fees and costs on Bunch's behalf.

II. Article III Jurisdiction

The city and the other remaining defendants contend that Chew has been fully compensated by the $13,000 verdict against Bunch, and that in view

of the city's decision to assume "full responsibility" for all damages, no real case or controversy with Chew remains. According to the defendants, allowing Chew to pursue the instant action any further would result in an "advisory opinion" that has already been fully redressed. Therefore, the defendants argue, we lack Article III jurisdiction over the present appeal.

Defendants did not raise this contention in the district court, perhaps in part because the judgment against Bunch was obtained after the court granted summary judgment for the remaining defendants. In any event, there was no reason for either party to have raised the question below. The issue relates solely to the effect of

an unchallenged judgment obtained against one defendant upon the plaintiff's right to appeal judgments in favor of other defendants. As such, it may be raised for the first time on appeal.[2]

Under Article III, federal appellate courts may adjudicate only actual, ongoing controversies between the litigants. Deakins v. Monaghan, 484 U.S. 193, 199 (1988). If there is no longer a live dispute between the

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[2]Neither party below wished to challenge the judgment against Bunch on the merits. The question of the preclusive effect of an unchallenged judgment may be raised initially when an appellant attempts to pursue a claim that his adversary believes to be barred. Accordingly the appellee may raise the issue for the first time by asserting a collateral estoppel or other preclusion argument in his appellate brief.

parties or a possibility that a plaintiff can obtain further relief, a case is moot. See Sea-land Service, Inc. v. International Longshoremen's & Warehousemen's Union, 939 F.2d 866, 870 (9th Cir. 1991) (case is moot if none of the issues within it is viable). Here, the defendants' position appears to be that the city's assumption of Bunch's liability to Chew precludes further litigation of his claims for additional relief, thus rendering the instant appeal moot. See 13A Charles Alan Wright et al., Federal Practice and Procedure, 3533.2 at 151 (Supp. 1993) (noting that mootness and claim preclusion are closely related doctrines).

[1] Chew's claims against the

defendants are not moot for two reasons. With respect to the first, we must start with the fact, ignored by the defendants, that the three constitutional violations alleged against Officer Bunch are different from the constitutional wrongs that they allegedly committed. Chew asserted that Bunch violated his constitutional rights first by improperly releasing Volker, a dangerous animal trained to bite and maul suspects, next by ordering the dog to attack him after he attempted to surrender, and finally by kicking him in the head and body. Chew charges that the other defendants violated his rights by adopting and implementing a policy of training and using police

dogs in an unreasonable manner. The allegations against the remaining defendants, if true, constitute wrongs distinct from any committed by Bunch, regardless of the fact that the dog bites are alleged to have resulted from the actions of all the defendants.

[2] Notwithstanding Chew's articulation of separate constitutional wrongs against the remaining defendants, those claims would be moot unless Chew could obtain some type of relief for them. See Sea-land, 939 F.2d at 870. The defendants assert that Chew is barred from seeking damages against them because the injury Chew incurred was fully compensated by the jury verdict and the subsequent payment of damages by the city on

Bunch's behalf. They are wrong. For the reasons set forth in the next section, Chew can recover actual damages from the remaining defendants. Moreover, it is well settled that a plaintiff may recover nominal damages for a "separate and distinct [constitutional] wrong" whether or not he is permitted to recover actual or punitive damages for that wrong. Larez v. City of Los Angeles, 946 F.2d 630, 640 (9th Cir. 1991). Thus, Chew would in any event be free to pursue his claims against the remaining defendants for nominal damages.

Chew's claims are not moot, and we have Article III jurisdiction over this appeal.

III. Issue Preclusion

The defendants' next contention, alluded to briefly above, is that the jury verdict and its subsequent satisfaction by the city serves to bar Chew from obtaining any actual damages against them. Whether they are correct depends upon the basis for the verdict. If it was based wholly or partly on the injuries inflicted by Volker after his release by the officer, the $13,000 damage award would necessarily represent a factual determination of the damages that Chew suffered on account of the dog bites. In that case both Chew and the defendants would be collaterally estopped from relitigating the issue of the dog bite damages. See RESTATEMENT (SECOND) OF JUDGMENTS 50(2) and comment d (1982); FSLIC v.

Reeves, 816 F.2d 130, 135 (4th Cir. 1987); Gill & Duffus Services, Inc. v. A.M. Nural Islam, 675 F.2d 404, 407 (D.C. Cir. 1982). Moreover, in that event, because the judgment obtained as compensation for the dog bite injuries would already have been paid in full, the so-called one satisfaction rule would preclude Chew from seeking a further monetary award from the remaining defendants for those injuries. See id.

The initial question, therefore, is whether the jury's verdict against Bunch was based, even in part, on the dog-bite injuries. The party asserting preclusion has the burden of showing that the issue as to which estoppel is claimed was actually adjudicated in a

prior proceeding. See Hernandez v. City of Los Angeles, 624 F.2d 935, 937 (9th Cir. 1980). Necessary inferences from the judgment, pleadings, and evidence will be given preclusive effect, but if there is doubt as to the scope of the prior judgment, collateral estoppel will not be applied. See Davis & Cox v. Summa Corp., 751 F.2d 341, 343 (9th Cir. 1985) citing Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980). Where the prior judgment was based on a general verdict, the inquiry is whether rational jurors must necessarily have determined the issue as to which estoppel is sought. See id. ar 1519; see also United States v. Seley, 957 F.2d 717, 721, 722 n.3 (9th Cir. 1992) (applying collateral

estoppel where reasonable jurors could have reached only one of two conceivable results).

While, on the basis of the record before us, it appears that the jury may have compensated Chew for Volker's bites, we cannot say with any assurance that it did so. We simply have no way of knowing. It would not have been irrational or even unreasonable for the jury to have compensated Chew for Bunch's kicks and not for the dog's bites, or, to put it in more legalistic terms, for Bunch's direct rather than indirect assault. We can only speculate as to which injury or injuries underlay the verdict, and speculation will not support the application of collateral estoppel.

See Davis, 751 F.2d at 1519; see also Board of County Sup'rs v. Scottish & York Insurance, 763 F.2d 176 (4th Cir. 1985) ("We cannot distill special findings from a general verdict and to do so would intrude on the independent role of a jury as much as would a court's unilateral amendment of its verdict.") Consequently, we must presume, for collateral estoppel purposes, that the verdict compensated Chew for Bunch's kicks and not for Volker's bites.

This determination does not, however, conclude the issue preclusion inquiry. Specifically, Chew is left with the challenge of demonstrating that it is legally possible to assume that the jury found Officer Bunch not

liable for the dog bites and at the same time to hold the remaining defendants liable for them. That challenge is easily met. A judgment that Bunch is not liable for releasing Volker, given all of the circumstances, would not preclude a judgment that by implementing a policy of training and using the police dogs to attack unarmed, non-resisting suspects, including Chew, the remaining defendants caused a violation of Chew's constitutional rights. Supervisorial liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury. See Hopkins v. Andaya, 958 F.3d 881, 888 (9th Cir.

1992) (noting that "the police chief and city might be held liable for improper training or improper procedure even if [defendant police officer] is exonerated").

The jury in this case could have concluded that it was reasonable for Bunch to release Volker--even knowing what he was likely to do to Chew--given the fact that the procedures adopted by the city left him with no other means of apprehending the suspect that involved less risk of bodily injury to himself or the suspect. Because it is not clear that such a conclusion would be contrary to law or that rational jurors could not have reached that result, the doctrine of collateral estoppel does not preclude further

litigation of Chew's claims against the remaining defendants for actual damages on the basis an unconstitutional policy or the failure to supervise or train properly.

There is an additional reason why the verdict against Bunch does not bar Chew from seeking a remand for a further trial--a reason that applies only to the City of Los Angeles. The jury might have excused Bunch from liability for the dog bites on the ground of qualified immunity. — The district court instructed the jury that a public official is immune from liability "as long as his conduct does not violate clearly established constitutional or statutory requirements of which a reasonable

person would have known." The city is not entitled to a similar defense. See, e.g., Brandon v. Holt, 469 U.S. 464, 473 (1985). Because there is a possibility that the jury accepted Bunch's defense of qualified immunity and declined to award damages for the dog bites on that ground, the issue of the city's liability has not been actually and necessarily decided. See Barber v. City of Salem, Ohio, 953 F.2d 232, 237-38 & n. 1 (6th Cir. 1992) (explaining that verdict for defendant police officers entitled to qualified immunity did not preclude recovery against city).

[3] For these reasons, the satisfaction of the judgment against Bunch does not bar Chew from pursuing

his claims for actual damages for his dog-bite injuries against the remaining defendants. Moreover, because it is not clear that Chew has received any compensation at all for Volker's bites, the $13,000 judgment may not be subtracted from any future recovery he obtains for those injuries. Thus, whether they are labelled as arguments relying on mootness, claim preclusion, issue preclusion or the one satisfaction rule, the jurisdictional or procedural obstacles urged by the defendants present no barrier to any further proceedings in this case. We must therefore turn to the merits of the district court's grant of summary judgment in favor of all defendants other than Bunch.

IV. Merits

The district court granted summary judgment in favor of the remaining defendants on the ground that the use of Volker for the purpose of apprehending Chew was an objectively reasonable act. Chew v. Gates, 744 F.Supp. 952, 956 (C.D. Cal. 1990).[3] We must determine, viewing the evidence in the light most favorable to Chew,

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[3]The district court denied summary judgment against Bunch because of allegations of unreasonable conduct that applied solely to Bunch, namely, that Bunch ordered Volker to attach Chew after he attempted to surrender, and wrongfully kicked Chew in the head and body. Under the jury instructions, the jurors could have based their decision on the theory that the use of Volker was unreasonable in itself. Because summary judgment was denied, Chew was free, absent a contrary order by the court, to introduce evidence to support any theory comprehended by his complaint.

whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-1340 (9th Cir. 1989).

A. The City of Los Angeles

In order to succeed on his section 1983 claim against the city, Chew must demonstrate first that his seizure by Volker was unconstitutional and second that the city was responsible for that constitutional wrong. Monell, 436 U.S. at 690-94. Chew advances two distinct theories of Monell liability. First, he contends that Officer Bunch violated his Fourth Amendment right not to be subjected to excessive force by unreasonably releasing Volker and that

Bunch's action in releasing the dog (given the alternatives then available to him), the city's policy of training police dogs such as Volker to apprehend unarmed and non-resistant suspects by biting, mauling, and seizing them was itself unreasonable and unconstitutional.

The district court held that the city was not liable under either theory for the bites inflicted by Volker because "the manner in which the police dog was used to apprehend Chew did not, under the circumstances, infringe on his constitutional rights." 744 F.Supp. at 956.[4] Initially, we must

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[4]The district court was obviously referring only to the release of Volker and not to Bunch's alleged order to attack Chew after he attempted to surrender. The latter act, if it

determine whether the district court correctly concluded that Chew suffered no constitutional injury. Under Chew's first theory of municipal liability, whether a constitutional wrong was committed depends upon an assessment of the objective facts and circumstances bearing on the reasonableness of Officer Bunch's decision to release Volker. The existence of a constitutional injury under Chew's second theory is not dependent on the lawfulness of Officer Bunch's conduct, but instead turns on the reasonableness of the city's general policy of training dogs to bite and seize all suspects.

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occurred, would in any event have been contrary to city policy.

[4] For the reasons that follow, the district judge erred in finding as a matter of law that Officer's Bunch's decision to release Volker was reasonable. While the district court never reached them, there are also genuine issues of material fact with respect to whether Bunch's decision was made pursuant to city policy. Thus we are required to remand for trial on Chew's first theory of municipal liability. It is therefore unnecessary to determine whether the record requires reversal on Chew's alternative Monell theory as well. Specifically, it is not necessary to decide here wither the city's policy of training its police dogs to bite and seize is unconstitutional. However, on remand,

Chew is entitled to pursue that question fully, as well as any other theory of municipal liability as to which he can obtain probative evidence.

1. Bunch's Decision to Release Volker

With respect to Chew's first theory--that a triable issue of fact exists as to whether Bunch's release of Volker constituted the use of unreasonable force--we start from the fundamental premise that the use of force to effect an arrest is subject to the Fourth Amendment's prohibition on unreasonable seizures. See Graham v. Connor, 490 U.S. 386 (1989). There is, of course, no mechanical test for determining whether a particular application of force was unreasonable;

the reasonableness of a seizure must instead be assessed by carefully considering the objective facts and circumstances that confronted the arresting officer or officers. See id. at 396.

In determining reasonableness, "the nature and quality of the intrusion on the individual's Fourth Amendment interests" must be balanced against the "countervailing government interests at stake." Id. (internal quotations omitted). To assess the gravity of a particular intrusion on Fourth Amendment rights, the factfinder must evaluate the type and amount of force inflicted. In weighing the governmental interests involved the following should be taken into account:

(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. Id.[5] The relevant inquiry is,

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[5]Other courts have supplemented these factors with such matters as whether a warrant was used, whether the plaintiff resisted or was armed, whether more than one arrestee or officer was involved, whether the plaintiff was sober, whether other dangerous or exigent circumstances existed at the time of the arrest, and the nature of the arrest charges. See Hunter v. District of Columbia, 943 F.2d 69, 77 (D.C. Cir. 1991). Their determination that the three factors articulated in Graham do not constitute the exhaustive criteria for determining excessive force is undoubtedly correct. In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider. These factors will all be appropriate for the district court to take into account on remand.

moreover, an objective one--good intentions will not redeem an otherwise unreasonable use of force, nor will evil intentions transform an objectively reasonable use of force into a constitutional violation. Id. ar 397. Because questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury. See Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991), cert. denied, 112 S.Ct. 2995 (1992); White by White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986).

[5] Here, the district court itself applied the "objective reasonableness" test. The court

reasoned that all three of the factors articulated in Graham v. Connor supported the decision to use canine force to arrest Chew, and on that basis held that Bunch's release of Volker was reasonable as a matter of law. When all disputes of fact are resolved in Chew's favor, as they must be for purposes of summary judgment, it is apparent that application of the Graham factors would not have required a rational jury to decide that using Volker to apprehend him was reasonable. Moreover, the district court's decision to take the excessive force question away from the jury conflicts with circuit law.

First, it is necessary to assess the quantum of force used to arrest

Chew. The three factors articulated in Graham, and other factors bearing on the reasonableness of a particular application of force, are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure--an analysis the district court never explicitly undertook.[6]

[6] By all accounts, the force

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[6]There are two ways to interpret the district court's silence on the question of the amount of force used. The district court might have found it unnecessary to analyze the degree of force used because it viewed canine force as slight and hence of little consequence, or because it found that the amount of force used was self-evidently justified on the record before it. Neither conclusion, however, is supportable. Moreover, the better practice is to explicitly state on the record the court's assessment of the quantum of force used to effect an arrest.

used to arrest Chew was severe. Chew was apprehended by a German Shepherd taught to seize suspects by biting hard and holding. According to the defendants, Volker had to bite the suspect three times before he could achieve an effective hold. Chew adds that, gripping his left side and then his left arm with his jaws, the dog dragged him between four and ten feet from his hiding place. Chew asserts that his arm was nearly severed. Officer Bunch acknowledged that the injuries to Chew's side and arm were "pretty severe," and that [t]here was some serious lacerations."[7]

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[7]Given the violent nature of Volker's attack on Chew, and considering the fact that Volker was still engaged in biting him when the officers came upon the scene, it is not

[7] Bunch had good reason to expect that Chew might sustain exactly this type of mauling when he released Volker. All of the K-9 officers testified that the police dogs were trained to bite suspects unless a countermanding order was given by the handler. Here, because Volker was sent to locate a concealed suspect, the dog would almost necessarily be out of sight of its handler, and hence beyond the reach of a countermanding order, if

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surprising that Chew was responding by hitting the dog with a metal pipe. (there is of course no indication that Chew was armed with that instrument when he fled his car. Rather, it appears that the pipe was in the scrapyard, readily available to Chew as a defensive weapon at the time Volker assaulted him.)

and when he came upon Chew.[8] Further, the deposition of Sergeant Mooring established that if a suspect attempted to elude the dog's bite instead of passively allowing the animal to maintain its hold, the dog would repeatedly bite the suspect in an effort to obtain a sustained grip with its jaws. Chief Gates' deposition disclosed that he was "very much" aware that such bites could be fatal, and Officer Bunch echoed this awareness. Cf. Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) (burglary suspect died

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[8]This conclusion is buttressed by Sergeant Mooring's deposition testimony that there are "many, many cases" in which the dogs would be out of sight of their handlers, and that ordering the handlers to maintain constant surveillance over their animals simply would not be feasible.

of wounds inflicted when a police dog seized him by the throat).

[8] **Second,** it is necessary to turn to the district court's application of the Graham criteria, beginning with the most important single element of the three specified factors: whether the suspect poses an immediate threat to the safety of the officers or others. The record does not reveal an articulable basis for believing that Chew was armed or that he posed an immediate threat to anyone's safety. Cf. Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that fourth amendment permits use of deadly force to apprehend a fleeing felon where there is "probable cause to believe the suspect poses a threat of

serious physical harm"). Chew was initially stopped for a traffic violation. Before he fled, he was asked for his driver's license, and produced it. He also retrieved cigarettes and a lighter from his car, lit a cigarette, and engaged in a certain amount of conversation with the officer before his flight. Apparently, nothing about Chew's appearance or demeanor gave the officer reason to believe he should search the suspect. It appears from the record that after fleeing Chew hid in the scrapyard for an hour and a half before Bunch released Volker in an effort to capture him. The defendants do not suggest that Chew engaged in any threatening behavior during this time, or that he

did anything other than hide quietly. in light of these facts, a rational jury could easily find that Chew posed no immediate safety threat to anyone.

The existence of a factual question as to whether Chew posed a safety threat would in itself be enough to preclude summary judgment in favor of the defendants if we were to determine that seizing a suspect by means of a German Shepherd trained to bite hard then hold constitutes deadly force, see Garner, 471 U.S. at 11 (holding that fourth amendment does not permit use of deadly force to apprehend suspect who poses no immediate threat to the officer and no threat to others). Indeed, Judge Norris's separate opinion rests on the

conclusion that Chew has presented a genuine issue of material fact with respect to whether the Los Angeles Police Department's use of dogs constitutes "deadly force." He may well be right. However, it is not necessary to decide here whether the record sufficiently raises that question, for the grant of summary judgment must be reversed whether or not Chew adduced adequate evidence tending to show that the considerable force used here was "deadly." Of course, as stated earlier, Chew is free on remand to pursue the deadly force issue fully.

The other two specified Graham factors cut in favor of the defendants, but only slightly. With respect to

whether Chew was "actively resisting arrest," it is undisputed that he fled and then hid from the police. He did not, however, resist arrest to the point of offering any physical resistance to the arresting officers, nor, at the time the officers released the dogs, did they have any particular reason to believe that he would do so. With respect to whether he was attempting to evade arrest by flight when Volker was released, the answer is yes and no. In a general sense he was, but in more precise terms his flight had terminated, at least temporarily, in the scrapyard. Still, a slight edge goes to the government on this score.

Turning to the severity of the crime for which Chew was arrested,

although he was initially stopped for a traffic violation, the traffic officer later discovered the existence of three outstanding felony warrants for his arrest. The district court correctly pointed out that outstanding felony warrants are not to be taken lightly. However, in view of the fact that the record does not reveal the type of felony for which Chew was wanted, the existence of the warrants is of limited significance. A wide variety of crimes, many of them nonviolent, are classified as felonies. The Supreme Court has observed that "while in earlier times the gulf between felonies and the minor offences [sic] was broad and deep, today, the distinction is minor and often arbitrary." Garner,

471 U.S. at 14 (internal quotation omitted). It added" "the assumption that a felon is more dangerous than a misdemeanant [is] untenable." Id. The existence of three warrants for undetermined crimes--for which Chew had not been tried or convicted--is thus not strong justification for the use of dangerous force.[9] The significance of

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[9]While defense counsel contended at oral argument that the warrants were issued in connection with burglaries, this information was not part of the record before the district judge, and certainly was not known to Officer Bunch. Moreover, inclusion of this information in the record would make no appreciable difference to the analysis set forth in the text. In Garner, the Court noted that the fact that "an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous." Id. at 21. The Court also took notice of statistics showing that burglaries only rarely involve physical violence, and of the FBI's classification of burglary as a

the warrants is further diminished by the facts that Chew was completely surrounded by the police, and that the prospects for his imminent capture were far greater than are those of the many fleeing suspects who are fleeter than the police officers chasing them.

This was not an occasion on which the police were forced to make "split-second judgments" in circumstances that were "rapidly evolving." Graham, 490 U.S. at 397. Chew was trapped in the scrapyard for two uneventful hours before Volker bit and mauled him. There was time for deliberation and

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"property" rather than a "violent" crime. Id. Here, there is not even an indication that the burglaries for which Chew was wanted occurred at night. See Cal. Penal Code 460 (1988) ed.).

consultation with superiors. There was even time for the police to summon a helicopter to the scene, an airborne vehicle which apparently aided the dogs in their search. What other tactics if any were available--given the absence of urgency--is, again, a question to be explored upon remand.

[9] Under all of the circumstances, the question of the reasonableness of the decision to use the force involved, whether or not "deadly," to seize Chew must be submitted to a jury. When the record is viewed in the light most favorable to the nonmoving party, the Graham factors do not all support either side. However, the most important factor--the absence of an immediate safety threat--

cuts strongly in Chew's favor, while the other two tilt only slightly in favor of the defendants. Such a record does not render reasonable as a matter of law the considered judgment to unleash a German Shepherd trained to seize suspects by "biting hard and holding." by mauling and sometimes seriously injuring them. Moreover, while no circuit precedent is precisely on point, Reed v. Hoy 909 F.2d 324 (9th Cir. 1989), cert.denied, 111 S. Ct. 2887 (1991) appears to establish the existence of a jury issue a fortiori.[10]

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[10]Reed involved an angry confrontation between Deputy Hoy and Reed after the deputy arrived at Reed's residence to investigate a domestic dispute. Reed threatened Hoy first with a bamboo stick and then with a splitting maul. Hoy repeatedly warned Reed to put down the splitting maul, and retreated by walking backwards.

Reed demonstrates that whether a particular use of force was reasonable is rarely determinable as a matter of law. That decision controls the outcome of the excessive force question in this case. If Deputy Hoy's split-second decision to use deadly force in response to an impending threat to his own safety was not reasonable as a matter of law, we cannot say that in

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Reed refused to heed the warnings and continued to advance. Hoy then drew his service revolver, again warned Reed to put down the maul, and shot him in the chest. Reed sued under 1983, contending that Hoy used excessive force.

The court rejected Hoy's contention that his actions were reasonable as a matter of law, holding instead that on the records before it a rational jury could find for either party. Id. at 330. Certainly Reed presented a greater and more immediate threat than Chew.

this case the use of force that at the very least approaches deadly proportions meets that standard. See Garner, 471 U.S. at 11 (threat to officer and public must be immediate to justify application of deadly force).

[10] In conclusion, the question whether it was reasonable under the Fourth Amendment for Bunch to release Volker was for the jury.[11]

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[11]The defendants principally rely on Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) for the proposition that the use of a police dog to apprehend Chew was reasonable as a matter of law. Robinette was a Section 1983 action brought by the estate of a burglary suspect killed by a police dog who found him hiding in a car dealer's showroom, under a car. Robinette does not control the result here. First, Robinette, which predates Graham, appears to have been decided under the assumption that anything short of deadly force may constitutionally be used to apprehend a felon. See id. at 911-13; Jones v.

2. Municipal Liability

Although the district court ended its inquiry with the question whether Chew's constitutional rights were violated by the release of Volker (and the dog's subsequent conduct), we cannot. Because a genuine dispute of

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F. Supp. 965, 971 n. 3 (N.D. Ill. 1988). This assumption conflicts with the holding and the reasoning of Graham as well as with prior circuit law. See, e.g., Robins v. Harum, 773 F.2d 1004 (9th Cir. 1985). Second, the court in Robinette concluded that the officers on the scene had "probable cause" to believe that the suspect threatened their safety. 854 F.2d at 913. No similar showing of probable cause can be made here. Finally, in concluding that the use of canine force was reasonable, the court was heavily influenced by the fact that the suspect was "hidden inside a darkened building in the middle of the night." 854 F.2d at 913 & n. 5. This case does not involve similar circumstances; it involves a daytime arrest of a suspect who, though hiding, was surrounded and might well have been captured without the infliction of physical injuries.

material facts exists as to the constitutional violation, we must consider whether the district court's grant of summary judgment for the city may be affirmed on the ground that Chew's injury did not result from the application or enforcement of an official city policy. See Jackson v. Southern California Gas Co., 881 F.2d 638, 643 (9th Cir. 1989) (summary judgment may be upheld based upon any ground supported by the record.

Under the Monell doctrine, Chew may recover from the city if his injury was inflicted pursuant to city policy, regulation, custom, or usage. See Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 690-91 (1978). City policy "need only cause [the]

constitutional violation; it need not be unconstitutional per se." Jackson v. Gates, 975 F.2d 648, 654 (9th Cir. 1992); see also Collins v. City of Harker Heights, Tex., 112 S. Ct. 1061, 1067 (1992).[12] City policy "causes" an

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[12]Judge Norris' separate opinion is slightly, if unintentionally, misleading when it states that we must determine in this appeal whether the Los Angeles Police Department's policy is constitutional. See opinion of Judge Norris at 6986. Of course, we need not determine the constitutionality of the Department's policy here; we need only determine whether the district court properly granted summary judgment in favor of the city and its policy makers. Moreover, although Chew will certainly be free to argue on remand that the city policy is unconstitutional on its face, the city would not necessarily escape liability even if it showed that the policy is facially constitutional. To prevail at trial, Chew need not prove the policy unconstitutional. Rather, he need only show that the specific use of force (i.e., Bunch's decision to release Volker) violated the Constitution, and that city policy

injury where it is "the moving force" behind the constitutional violation, Monell, 436 U.S. at 694, or where "the city itself is the wrongdoer." Collins, 112 S.Ct. at 1067.

[11] There is little doubt that a trier of fact could find that Chew's injury was caused by city policy. In the district court, the city conceded, for purposes of summary judgment, the truth of Chew's contention that departmental policy authorized seizure of all concealed suspects--resistant or nonresistant, armed or unarmed, violent or nonviolent--by dogs trained to bite

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caused the unconstitutional application of force in this instance.

hard and hold.[13] Construing city policy as the appellee concedes we must, it doubtless could be found to be the "moving force" behind Chew's injury. Bunch released Volker because his superiors instructed him that he was authorized to do so under the

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[13] In their reply to the defendants' answer to the summary judgment motion, defendants stated:

> [Chew] states there is a factual issue as to whether the use of police dogs as of the date of the incident was "policy" or "not policy." Of course if it was not policy, there could be no Monell claim. However for the purpose of this motion it is assumed that it was "policy." [] He also states that there is a factual issue as to what the policy was.... [H]owever, for the purpose of his motion, it is assumed that the dogs are used to find and seize by biting a concealed suspect who refuses to surrender even if he offers no physical resistance to the dog.

circumstances of Chew's case. The instructions were based on what we assume to be city policy. Accordingly, we must reverse the district court's grant of summary judgment in favor of the City of Los Angeles.

In its brief on appeal, the city ignores the concessions it made in the district court and attempts to argue that even if the department's policy was to use dogs to apprehend concealed suspects by biting and mauling them, this policy was attributable only to the officers responsible for training the canine units, and not to the policy chief or the police commission--the to entities vested with the authority to make municipal policy. The city is bound by the concession it made in the

district court. However, even if it were not, summary judgment for the city would be inappropriate on this record.

A city cannot escape liability for the consequences of established and ongoing departmental policy regarding the use of force simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers. Los Angeles could not, for example, distance itself from policy regarding the use of firearms by de facto delegating the formulation of firearms policy to the commander of the police academy. So too here: if the city in fact permitted departmental policy regarding the use of canine force to be designed and implemented at lower

levels of the department, a jury could, and should, nevertheless find that the policy constituted an established municipal "custom or usage" regarding the use of police dogs for which the city is responsible. See City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988).

Further, even if we were to accept the city's argument that no jury could find that departmental canine policy was officially sanctioned, municipal liability could be found under the "deliberate indifference" formulation of Monell liability. See City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989). In order to accept the city's contention that departmental canine policy was not officially

sanctioned, we would have to find that the city itself had no policy regarding the proper use of canine force, or, at best, a policy of vesting complete discretion regarding the use of the canines in the dogs' handlers. The record contains evidence that the dogs bit suspects in over 40% of the instances in which they were used. Where the city equips its police officers with potentially dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the case in which they are used, a failure to adopt a departmental policy governing their use, or to implement rules or regulations regarding the constitutional limits of that use,

evidences a "deliberate indifference" to constitutional rights. Under such circumstances, a jury could, and should, find that Chew's injury was caused by the city's failure to engage in any oversight whatsoever of an important departmental practice involving the use of force.

Finally, as noted earlier, on remand Chew is not limited to pursuing any single theory underlying our decision that summary judgment was improper. The district court's grant of summary judgment to the city was based on the conclusion that Officer Bunch's decision to release Volker was reasonable. However, municipal liability need not be predicated on an "unreasonable" action on Officer

Bunch's part. A jury could conceivably decide, for example, that although the officer's on-the-scene decision to use canine force was reasonable under the circumstances, the city was nevertheless at fault for providing its officers with dogs trained to bite and seize all concealed suspects regardless of their efforts to surrender. If the plaintiff could prove at trial that training in less dangerous means of detection and apprehension was both feasible and effective from a law enforcement standpoint (and the city's recent adoption of a "find and bark" policy suggests that it may well have been[14]), then the city's failure so to

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[14]See "LAPD Begins Warnings on Use of Dogs," Los Angeles Times, September 30, 1992, part B, p. 3, col. 5

train its dogs may well have constituted an unreasonable municipal action regarding the use of force.

Judge Norris has written separately in order to discuss fully the critical issue of whether the city's policy regarding the use of police dogs violates the Garner deadly force rules. The matters set forth in his opinion are certainly appropriate for Chew to pursue and develop by means of a proper evidentiary showing on remand. Essentially, Judge Norris suggests that using police dogs trained to "bite and seize" suspects to locate and hold concealed individuals who are

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(reporting that the department has commenced training its dogs to bark and alert rather than to bite suspects).

not reasonably believed to be dangerous may violate the Fourth Amendment. He may well be correct. It is also possible, however, that siccing dogs trained in such a manner on any suspects would be found to violate that Amendment, if the method of training is found to be unreasonable in light of available alternatives. Both of these issues are deserving of full exploration upon remand.

B. The Individual Defendants

1. Prima Facie Liability

[12] Chew sues Gates, Mooring, McKinley, and Yarnall in their individual capacities.[15] Although

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[15]Chew also sues Gates in his official capacity. Official capacity suits generally represent only another way of pleading an action against the entity of which the officer is an

these defendants did not personally participate in the infliction of Chew's injury, they may be held individually liable if they "cause[d]" him to be subjected to a constitutional deprivation. Berguist v. County of Cochise, 806 F.2d 1364, 1369 (9th Cir. 1986), disapproved on other grounds, Canton v. Harris, 489 U.S. 378, 388 (1989). The existence of the requisite causal connection is implicit in the earlier conclusion that liability on the part of both Officer Bunch and the city could flow from Bunch's decision

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agent. Kentucky v. Graham, 473 U.S. 159, 165 (1985). Where, as here, the government entity receives notice and an opportunity to respond to the official capacity suit, "[the] suit is, in all respects other than name, to be treated as a suit against the entity." Id. at 166.

to use canine force against Chew. The remaining individual defendants all served as links connecting the officer and the city in this respect. Mooring and Yarnall designed and implemented departmental policy governing the use of canine force, McKinley had overall supervisory responsibility for the K-9 unit, and Chief Gates was not only responsible for the operations of the department as a whole, but was familiar with the canine incidents that occurred and regularly reported to the police commission on the performance of the K-9 unit. Viewed in the light most favorable to Chew, this evidence presents a genuine issue of material fact as to whether each of these defendants authorized,. approved, or

acquiesced in the canine force policy--a policy which may following trial be determined to constitute a cause of Chew's injuries. See Los Angeles Protective League v. Gates, 907 F.2d 879,894 (9th Cir. 1990); McRorie v. Shimoda, 795 F.2d 780, 783-84 (9th Cir. 1986), citing Heller v. Bushey, 759 F.2d 1371, 1375 (9th Cir. 1985), rev'd and remanded on other grounds sub non., City of Los Angeles v. Heller, 475 U.S. 796 (1986).

2. Qualified Immunity*

[13] We conclude, however, that the district court's grant of summary judgment in favor of the individual defendants other than Bunch on the ground of qualified immunity was proper. For the purposes of this

section, we continue to assume that departmental policy authorized the use against all concealed suspects of dogs trained to search for and apprehend persons by biting and seizing then. 744 F.Supp. at 954. Whether the defendants are entitled to qualified immunity for their actions in formulating or implementing such a policy "turns on the objective legal reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987) (internal cites and and quotation marks omitted). Specific precedent is not required in order to overcome a qualified immunity defense, but the law in question must

be sufficiently clear that the unlawfulness of the action would have been apparent to a reasonable official. Id. at 640. Here, a reasonable law enforcement official might well have failed to recognize that authorizing or implementing the policy at issue would result in the violation of the constitutional rights of persons seized by the police dogs.

[14] When the incident that led to the filing of this lawsuit occurred, the use of police dogs to search for and apprehend fleeing or concealed suspects constituted neither a new nor a unique policy. The practice was long-standing, widespread, and well-known. No decision of which we are aware intimated that a policy of using

dogs to apprehend concealed suspects, even by biting and seizing them, was unlawful. At the time of the incident in question,, the only reported case which had considered the constitutionality of such a policy had upheld that practice. See Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) (holding that use of police dog trained to bite a suspect's arm or other available limb to apprehend a burglary suspect hiding in a darkened building was constitutional). We are certain that Robinette is not consistent with the law of this circuit today, see supra note 10, and seriously doubt whether we would ever have reached a similar result. Nevertheless, at the time of Chew's arrest, Robinette was

the only appellate decision in the general area.[16] Because of the then

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[16]In attempting to distinguish Robinette, see Opinion of Judge Norris at 7000-1, Judge Norris ignores one crucial point; the dog in that case was trained and employed in essentially the same fashion as the dogs at issue here, and the Sixth Circuit held that dogs trained in such a manner did not constitute deadly force, even though the dog in Robinette killed the plaintiff's decedent. Our inquiry on the deadly force issue for qualified immunity purposes asks whether a reasonable officer would have known that the use of police dogs in this manner constituted deadly force. Robinette held that a police dog, trained to hold and bite, which killed someone did not constitute deadly force. In light of this decision it is difficult to understand why a reasonable officer should have known that L.A.P.D. police dogs trained and employed in a similar manner would be held to be deadly force, especially since there is no evidence in the record that any L.A.P.D. dog ever killed anyone.

Judge Norris reads Robinette as being a decision about whether or not a "particular dog" constituted deadly force. See Opinion of Judge Norris at

current widespread acceptance of the practice of using police dogs to make arrests, and the absence of any contrary authority, we conclude that at the time of Volker's assault there was

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7000-1. It should be obvious, however, that the Sixth Circuit would not have issued a published opinion if its decision were so narrowly limited. If we were ordinarily to read cases in the manner in which Judge Norris reads Robinette, Brown v. Board of Education, 347 U.S. 483 (1954), would stand for the proposition that separate is inherently unequal only in Topeka, Kansas, (or possibly only as to Linda Brown), Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), would stand for the proposition that the courts have the power of judicial review only when considering the validity of a statute conferring mandamus jurisdiction, and our judiciary would be in an even worse state than it already is. Certainly, in the case before us, a police officer in the Sixth Circuit would have been entitled to qualified immunity. Under all of the circumstances, see discussion infra, we believe an officer in the Ninth Circuit was entitled to that protection as well.

no clearly established law prohibiting the use of dogs in the manner permitted by the Los Angeles Police Department's policy.

Chew contends that it was apparent from several district court decisions discussing the use of police dogs that the department's canine force policy was unlawful. See Luce v. Hayden, 598 F. Supp. 1101 (D. Me. 1984); Soto v. City of Sacramento, 567 F. Supp. 662 (E.D. Cal. 1983); Starstead v. City of Superior, 533 F. Supp. 1365. 1365 (W.D. Wis. 1982). The facts in all of these cases differ dramatically from the circumstances in which the use of dogs was authorized under the L.A.P.D. policy. In Luce, the plaintiff claimed that state troopers "sicced" a dog on

him while he was lying prone and handcuffed. Similarly, in Soto, the plaintiff alleged that he had surrendered, was lying on the ground, and had spread his hands pursuant to police instructions when the police released the dog that bit him. Finally, Starstead dealt with a number of completely gratuitous uses of canine force, including the use of biting dogs against handcuffed suspects and against a defendant stopped for a traffic violation. The circumstances in these cases are far too far removed from the policy involved here to be of any aid to Chew.

Marley v. City of Allentown, 774 F. Supp. 343, 345-46 (E.D. Pa. 1991), aff'd mem., 961 F.2d 1567 (3d Cir.

1992), does not support Chew's claim, either. Marley was decided after the incident in this case, and it involved an episode which took place after Chew's apprehension. Accordingly, at best the decision is of limited use in determining whether the policy at issue here was clearly unlawful at the time the defendants formulated and implemented it. Marley also involved a very different set of circumstances from this case. The district court in Marley distinguished Robinette on two grounds: (1) that the suspect in Robinette was a suspected felon, while the suspect in Marley was a suspected misdemeanant; and (2) that the suspect in Marley was "either fleeing or stopping," while the suspect in

Robinette was hiding. Id. at 345. On both grounds, Chew's case is much closer to Robinette than to Marley.[17]

We conclude that as of the time Chew was bitten by Volker the

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[17]Judge Norris suggests that we miss the point by noting the factual distinctions between this case and Marley. He purports to rely only on Marley's qualified immunity methodology, a methodology he claims is "mandated by our recent decision in Mendoza." Opinion of Judge Norris at 7002. As we explain infra, the methodology employed in Mendoza does not compel a finding of qualified immunity in this case. Although "generic principles of excessive force law," Opinion of Judge Norris at 7002, would lead a reasonable officer to conclude that under some circumstances it would be unlawful to use a police dog, those same generic principles would lead a reasonable officer to believe that under other circumstances it would be lawful to do so. In light of the well established nature of policies like the L.A.P.D.'s, and in light of the case discussing similar policies, this case falls squarely into the latter category.

Los Angeles Department's longstanding policy regarding the training and use of police dogs did not contravene clearly established law. We recently explained in Mendoza v. Block, No. 92-56225, slip op. 5619 (9th Cir. May 31, 1994), that "[w]e do not believe that a more particularized expression of the law is necessary for law enforcement officials using police dogs to understand that under some circumstances the use of such a 'weapon' might become unlawful." Mendoza, slip op. at 5629 (emphasis added). While our statement was quite simple, if not self-evident, and was limited to the proposition that some uses of dogs will in particular instances violate clearly established

law, in his dissent Judge Norris transmutes that modest statement into an all-encompassing and pervasive pronouncement governing all uses of force. He claims that Mendoza stands for the proposition that "the law governing all excessive force cases, regardless of the instrument used to apply the force, is 'clearly established.'" Opinion of Judge Norris at 7003 (emphasis in original). Remarkably, he argues that, Mendoza, establishes the rule that "the generic principles established in Garner" render the law clearly established in all excessive force cases. Opinion of Judge Norris at 7003. It is difficult to recognize in Judge Norris's description of the case what Mendoza

actually says, and we must respectfully decline to read Mendoza as establishing so broad and unprecedented a rule as Judge Norris urges.[18]

We read our decision in Mendoza as meaning exactly what it said: it clearly established that under some circumstances the use of police dogs is

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[18]Indeed, we see no way of limiting the principle Judge Norris would have us adopt: If Garner means that the law is clearly established in every excessive force case, then Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), must mean that the law is clearly established in every free speech case, and Trop v. Dulles, 356 U.S. 86 (1958), must mean that the law is clearly established in every cruel and unusual punishment case. In short, under Judge Norris's reading of Mendoza, we would always conclude that the law is clearly established, regardless of the nature of the issue. Compare Judge Norris's unlimited reading of Mendoza to his "particular dog" reading of Robinette. See Supra note 16.

unlawful. However, that conclusion clearly does not advance Chew's cause. The Mendoza court gave the following example of the type of conduct that it considered prohibited by clearly established law: "[N]o particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control." Id. at 5629-30. While this statement of law is indisputable, the policy at issue here is far different from the siccing of dogs on handcuffed arrestees. See supra p. 6974-75. Here, we must determine whether it was clearly established that it was unlawful to use police dogs to search

for and apprehend concealed suspects by biting and seizing them. At the time the individual defendants implemented the Los Angeles Police Department's policy, the answer was, without question, "No."[19] Indeed, the Mendoza

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[19]Our conclusion here is consistent with the analysis in Act Up! Portanld v. Bagley, 988 F.2d 868 (9th Cir. 1993), in which we employed a two-part analysis" to determine whether the defendants were entitled to qualified immunity: "1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" Id. at 871. In Act Up!, we answered the first question in the affirmative, because "it was clearly established in this circuit that it is unlawful to strip search an arrestee brought to a jail facility on charges of committing a minor offense, unless the officer directing the search possesses a reasonable suspicion that the individual arrestee is carrying or concealing contraband." Id. at 871-72 (footnote and internal quotations omitted). We then said that it was necessary to answer the second question, "whether a reasonable officer

opinion itself makes this clear, in a direct and unambiguous manner. In surveying the established law regarding "the appropriate use of police dogs," Mendoza, slip op. at 5628, the Mendoza court quoted the following statement from the district court opinion in the instant case: "Neither federal law nor

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could have believed probable cause (or reasonable suspicion) existed to justify a search or arrest." Id. at 873. In this case, however, we conclude that it was not clearly established that the use of dogs to search for, bite, and seize hiding suspects was either deadly force or unreasonable force. Thus we need proceed no further. Frequently, as here, the answer to Act Up!'s first question dictates our decision on qualified immunity, and not only when we decide that the law is not clearly established. In fact, in many cases the answer to the first part of the test will provide the total answer to the qualified immunity question, and a second and separate analysis will be unnecessary.

California law clearly prohibits the training and/or use of police dogs to find, seize, and hold suspects, by biting if necessary." Chew v. Gates, 744 F.Supp. 952, 954 (C.D. Calif. 1990), quoted in Mendoza, slip op. at 5628-29. Here, we simply reaffirm the statement we endorsed in Mendoza: when the defendants implemented the policy at issue in this case, it was not clearly established either that police dogs constituted deadly force, or that the use of dogs to find, bite, and hold concealed suspects was unreasonable.[20]

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[20]In light of Mendoza's reliance on the district court opinion below, we simply cannot comprehend Judge Norris's insistence on arguing that the case is controlling authority for his contention that the officers are not entitled to qualified immunity as a matter of law.

Although the decision in Robinette bolsters our conclusion that the officers are entitled to qualified immunity here, we rely principally on the fact that the policy employed by the Los Angeles Police Department was a longstanding official policy, which was well-known and similar to the policies employed in many police departments throughout the nation, none of which had been judicially questioned. Pace Judge Norris, we do not "regard Robinette as an automatic guarantee of qualified immunity to officers in . . . dog bite cases." Opinion of Judge Norris at 7000. Moreover, we do not mean to suggest by our decision that officers will be entitled to qualified immunity if they authorize the use of a

new weapon or tactic which violates constitutional norms, simply because there is no case stating that the specific weapon or tactic involved violates the Constitution. To the contrary, if new weapons or tactics are sufficiently similar in design, purpose, effect, or otherwise to weapons or procedures that have been held unconstitutional, so that a reasonable officer would have known that a court's holding of unconstitutionality would be extended to the new weapon or tactic, then qualified immunity will not apply. Similarly, even if a policy is long standing and no case has declared it unconstitutional, officers authorizing its continued use will not be entitled

to qualified immunity after a case has authoritatively declared unlawful other procedures that are not "meaningfully distinguishable." Wood v. Ostrander, 879 F.2d 583, 592 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990). Finally, we do not mean to suggest that all actions taken pursuant to a longstanding policy are necessarily immunized. An officer who unlawfully implements an official policy or ordinance in an egregious manner or in a manner which clearly exceeds the reasonable bounds of the policy is not entitled to qualified immunity, whether or not there is a case on point declaring such actions unconstitutional. In other words, even in the absence of relevant case law, if

the manner of implementation of an otherwise constitutional policy is not only unconstitutional but patently so, the officer will be deemed to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Moreover, the existence of an unofficial or unacknowledged policy or practice is not sufficient to immunize an officer from liability. The clandestine nature of such a policy may suffice to put a reasonable officer on notice that it violates established legal norms. Here, we simply do not believe that, given the historical facts and circumstances, the use of police dogs in the manner prescribed in

the Los Angeles Police Department's policy is sufficiently similar to other uses of force held to be unconstitutional by the courts to put reasonable law enforcement officials on notice that the department's policy violated the Fourth Amendment; nor do we believe that the individuals here seeking qualified immunity were otherwise put on notice by the nature of the conduct itself.

Because at the time of Chew's arrest the Los Angeles Police Department's longstanding, well-known practice of using police dogs to make arrests by biting and seizing was similar to that employed by other police departments across the country, because no court had ever questioned

such a practice, and because the practice is "meaningfully distinguishable" from other police conduct previously held unconstitutional, we conclude that the doctrine of qualified immunity is applicable. Accordingly, we affirm the district court's grant of summary judgment to all of the individual appellees, specifically, defendants Gates, McKinley, Mooring, and Yarnall.

V. The Dissent from the Reversal of the Judgment in Favor of the City of Los Angeles

When public concern rises dramatically over an issue like crime, and politicians in the highest offices throughout the land rush to abandon any pretense of a commitment to fundamental

constitutional principles, it is essential that judges keep their cool--that we, at least, remain determined to fulfill our role as the objective, steadfast guardians of individual liberty. First and foremost, it is our obligation to resist all temptations to succumb to hysteria, all inclinations to ignore our responsibilities and simply to join the pack.

Regrettably, it is necessary to add here that Judge Trott well knows that the reference to "the pack" is not to "decent people genuinely worried about the world in which they and their children live." Opinion of Judge Trott at 7009. Rather, the term obviously refers to those who in making or enforcing our laws knowingly and

hypocritically disregard the Constitution and instead do what is most expedient or serves their own self-interest. Judge Trott's maudlin attempt to portray himself as the defender of "the People" provides a fortuitous if most unfortunate example of that form of conduct.

Judges are not correspondents for Newsweek. We do not campaign for office in large, crime-ridden metropolitan areas. Nor, ordinarily, do we try to make the public believe that we are doing something about a problem when in truth we are not. Judges are supposed to be calm, dispassionate, and committed to the principles of law. We have a particular responsibility to the

Constitution, including the Fourth Amendment.

Judge Trott makes clear his distaste for the rules of law enunciated in Graham v. Connor and Tennessee v. Garner. It is unfortunate he feels that way--although that is his privilege. However, to call Chew a murderer and a rattlesnake is not. To accuse us of sending police officers to "the jaws of danger," Opinion of Judge Trott at 7033, demeans him and us. We are all experienced in the ways of law enforcement and of the Los Angeles Police Department. To talk of "judges tucked away behind magnetometers," Opinion of Judge Trott at 7008, is nonsensical.

There are serious legal issues

involved in this case that warrant informed discussion. Here, as with so many important issues, by exchanging reasoned views we could increase each other's understanding, and the public's as well. Rational, enlightened debate in this case could advance the interests of justice and the welfare of society. Judge Trott has the knowledge and experience to make a significant contribution to our efforts to balance societal interests and individual rights. Perhaps next tine he will do so.

As for this case, we are not free to abandon our responsibilities as Judge Trott suggests. We are not permitted by our oaths of office to leave the protection of constitutional

rights to the unreviewed discretion of "a police chief, an elected mayor, a police commission, and an elected city council." Opinion of Judge Trott at 7039. Today we do, however, leave the final answer as to the reasonableness of the city's policy and conduct to a jury, as the Constitution and our laws command.

Judge Trott grossly mischaracterizes today's holdings with respect to the use of excessive force. We do not send police dogs to the sidelines. We reverse a summary judgment order, so that there may be a full and fair factual trial before a jury of "the People" regarding the practices followed by the Los Angeles Police Department. No one should fear

or condemn such a trial, least of all a judge experienced in the law and in the legal process. The truth cannot be harmful in this case. The public has a right to know how the Los Angeles Police Department is training and using dogs that are capable of killing or maiming human beings--to know whether the City is acting within the law. In addition, the appellant, who was seriously injured, has a right to compensation if the police department has acted in an unconstitutional manner. To say, as does Judge Trott, that there is simply no legal question here is to denigrate the Constitution. It is to say that the police, unlike all others, are above the law--that their decisions as to how and when

deadly force shall be used are immune from judicial review. That way lies the beginning of the police state and the end of freedom.

VI. Conclusion

The judgment of the district court is **AFFIRMED IN PART** and **REVERSED IN PART**, and the case is **REMANDED** for further proceedings against the City of Los Angeles only.